

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

RECEIVED**JAN 13 1994**

In the Matter of)	FCC 93-451
)	
Amendment of the Commission's)	GEN Docket No. 90-314
Rules to Establish New Personal)	
Communications Services)	RM-7140, RM-7175, RM 7618
)	

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

REPLY TO COMMENTS OF RAND McNALLY ON
PETITIONS FOR RECONSIDERATION AND CLARIFICATION

Hill and Welch, a communications law firm, pursuant to the Commission's December 29, 1993 Order Denying Extension of Time, DA 93-1575, hereby replies to Rand McNally's January 3, 1994 Comments. In reply thereto, the following is respectfully submitted:

1) Hill & Welch's December 28, 1993 Comments To Petitions for Reconsideration argued 1) the Commission improperly adopted a costly rule without at all analyzing that rule's effect upon small businesses;¹ 2) Rand McNally, after learning that its Commercial Atlas & Marketing Guide would be used in a Federal licensing proceeding, changed its pricing and duplication policies to the detriment of consumers; 3) Rand McNally's claim to a copyright in its county groupings and maps is unfounded; 4) adopting Rand McNally's BTA/MTA structure will result in needless litigation as Rand McNally attempts to defend its dubious copyright;² 5) Rand

¹ We have reviewed Rand McNally's December 8, 1993 proposal and its subject Comments. Nowhere does Rand McNally define what its charges would be. Thus, the Commission cannot assess the financial impact of the MTA/BTA rule upon small businesses.

² As noted in our December 28, 1993 Comments, we are not interested in becoming involved in litigation to test Rand McNally's copyright claim. As discussed below, the Commission has alternative market structure methodologies which will eliminate Rand McNally's threat of litigation.

McNally's December 8, 1993 Proposal is not in the public interest. Rand McNally's January 3, 1994 Comments do nothing to advance the concept that the Commission should base its rules upon information provided by a private third party seeking compensation where the Commission did not put the job out for competitive bidding.³

2) Rand McNally asserts that compilations of data may be copyrighted. Comments, p. 3. Whether or not Rand McNally is correct is irrelevant because county groupings are not data. Rand McNally did not create the county names, those names are in the public domain. Rand McNally merely grouped counties to represent its idea that certain economic flows govern the course of commerce in this country. It is well settled in copyright law that only creative expressions may be copyrighted; mere ideas are not copyrightable.

3) Even if Rand McNally's county groupings were copyrightable, fair use would permit copying of its maps and county groupings. As we noted in our December 28, 1993 Comments, only two pages of Rand McNally's huge Commercial Atlas are useful to PCS applicants. Thus, there is a question of fact as to whether the use of two pages of a immense book constitutes an improper use of the book.

4) Moreover, Rand McNally presumably published its Commercial Atlas for use by persons engaged in commerce. Rand McNally's copyright assertion against the commercial use of a very small portion of its book apparently contradicts the very reason the book exists in the first place. The Commission cannot condone Rand

³ Unless the Commission reconsiders its decision to adopt the Rand McNally BTA/MTA structure, the rule will become known as one of the biggest "sweet-heart" deals in the history of administrative law.

McNally's economic opportunism contrary to the public interest which the Commission is statutorily obligated to protect.

5) Rand McNally's January 3, 1994 Comments suggest a modified proposal for disclosure and use of MTA and BTA county listings which is even more restrictive than the December 8, 1993 Proposal which we found unworkable. Rand McNally's claim that the modified proposal "better meets the reasonable needs and interests of participants" is preposterous to the point that one must wonder whether the sentence was inadvertently left in the pleading from an earlier draft.⁴

6) Rand McNally proposes to provide the Commission with "a hard copy listing" of the MTA and BTA counties which may not be duplicated. (Emphasis added). Rand McNally Comments, p. 6. How gracious, one copy for a country with 260 million inhabitants!⁵ Rand McNally does not state the public interest purpose which is

⁴ Like its December 8, 1993 Proposal, Rand McNally's January 3, 1994 modified proposal suffers from the defect that costs are not disclosed but are described as "reasonable". Based upon our experience, we would likely disagree with Rand McNally's view of reasonableness. Moreover, Rand McNally proposes to negotiate licensing packages on a case by case basis. Rand McNally Comments, p. 10. Because the costs are not disclosed, the Commission cannot fulfill its obligations under the Regulatory Flexibility Act; neither has the Commission assessed the costs associated with Rand McNally's threatened law suits. Finally, Rand McNally's use of undefined terms such as "end user" Rand McNally's modified proposal too vague for inclusion in the Commission's rules.

⁵ If the Commission adopts Rand McNally's modified proposal, we suggest that the Commission authorize a stress reducing pill concession in the pertinent reference room for use by persons waiting in the mile long line to view the listings. In keeping with recent practice, of course, the Commission should not consider alternative stress pill distributors for the concession so that the anointed stress pill distributor can maximize its profits at the expense of the public.

served by making one, non-reproducible listing available at the Commission where the public would have to contact Rand McNally to prepare an application in any event.

7) Rand McNally's conclusion that "small businesses should not experience unreasonable entry or long terms costs" . . . is wholly unsupported. Rand McNally Comments, p. 12. As explained in our December 28, 1993 Comments, this law firm is a small business which would be severely affected by Rand McNally's vague, unreasonable pricing structure.

8) Rand McNally does make one worthwhile suggestion, if the Commission finds Rand McNally's modified proposal unacceptable, which it is, the Commission should "select an alternative means of defining the geographic boundaries for the PCS." Rand McNally Comments, p. 11. In our December 28, 1993 Comments we suggested that the Commission adopt the MSA/RSA structure used in cellular radio. We noted that the Commission had considered that proposal but had rejected it. Thus, after much consideration, we have developed another market grouping alternative.

9) First, rather than use the terms "Major Trading Area" and "Basic Trading Area" the Commission should use "Large Market Area (LMA)" and "Small Market Area (SMA)".⁶

10) In adopting MTAs and BTAs the Commission was concerned that the number of markets not be as large as the combined number of MSAs and RSAs. We propose that LMAs consist of all of the counties contained within one state. Thus, there would be

⁶ The public has had notice for many months that the Commission would adopt some market structure based upon county composition. Thus, adoption of the instant proposal is permitted under the Administrative Procedure Act.

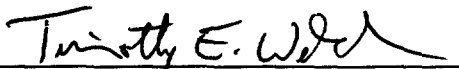
approximately 51 LMAs⁷, not significantly more than the 47 MTAs. Moreover, public confusion over market areas would be significantly reduced by utilizing a much more familiar market structure.

11) We propose that SMAs be constructed by grouping counties within a single state into groups of ten.⁸ Counties would be grouped from north to south, or east to west, or south to north, or west to east as the Commission desires. There would be approximately 320 SMAs, or substantially fewer than the 487 of BTAs.⁹ Because PCS will be a demand driven service, the regulatory composition of the markets is irrelevant to how PCS services will be offered.¹⁰ Moreover, larger market sizes will enhance the survivability of start-up business utilizing the 10-20 MHz allocations.

WHEREFORE, in view of the information presented to the Commission, the Commission should abandon the troublesome Rand McNally MTA/BTA market structure in favor of one which is more familiar, and far less costly, to the public.

Respectfully submitted,

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January 13, 1994


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⁷ Puerto Rico and Alaska are considered LMAs only with no SMA components. Washington D.C. is treated as a county of Maryland for purposes of placing it in an SMA.

⁸ If there are fewer than 10 counties in a state then that state would have 1 SMA. If there is a remainder in the quotient resulting from the division of 10 into the number of counties in a particular state, the remaining counties would constitute an SMA. The Commission could decide to group the counties into groups of 20.

⁹ Attached hereto is a listing of states, the number of counties, and the number of SMAs contained within each state.

¹⁰ The irrelevance of market boundaries is evidence by the market reformations which occurred in cellular radio.

SMALL MARKET AREAS

State	Number of Counties	Number of SMAs @ 10 Counties Per SMA	Number of SMAs @ 20 Counties Per SMA
Alabama	67	7	4
Arizona	14	2	1
Arkansas	75	8	4
California	58	6	4
Colorado	63	7	4
Connecticut	8	1	1
Delaware	3	1	1
Florida	67	7	4
Georgia	68	7	4
Hawaii	5	1	1
Idaho	44	5	3
Illinois	102	11	6
Indiana	92	10	5
Iowa	99	10	5
Kansas	105	11	6
Kentucky	120	12	6
Louisiana	64	7	4
Maine	16	2	1
Maryland	25 ¹¹	3	2
Minnesota	87	9	5
Mississippi	82	9	5
Missouri	115	12	6
Montana	57	6	5
Michigan	83	9	5
Massachusetts	14	2	1
Nebraska	93	10	5
Nevada	17	2	1
New Hampshire	10	1	1
New Jersey	21	3	2
New Mexico	32	4	2
New York	62	6	4
North Carolina	100	10	5
North Dakota	53	6	4
Ohio	88	9	5
Oklahoma	77	8	4
Oregon	36	4	2
Pennsylvania	67	7	4
Rhode Island	5	1	1
South Carolina	46	5	3
South Dakota	66	7	4
Tennessee	95	10	5
Texas	254	26	13
Utah	29	3	2
Vermont	14	2	1
Virginia	95	10	5
Washington State	39	4	2
West Virginia	55	6	4
Wisconsin	72	8	4
Wyoming	23	3	2
		<hr/> 320	<hr/> 177

¹¹ Includes Washington, D.C.

CERTIFICATE OF SERVICE

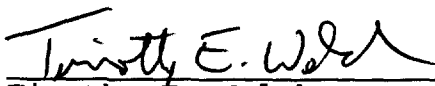
I hereby certify that I have this 13th day of January 1994 sent a copy of the foregoing REPLY TO COMMENTS OF RAND MCNALLY ON PETITIONS FOR RECONSIDERATION AND CLARIFICATION to the parties noted in MCI's service list filed with its January 3, 1994 Opposition, with the following additions, by first class United States mail, postage prepaid:

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